

2014 WL 5789660 (Kan.App.) (Appellate Brief)
Court of Appeals of Kansas.

Latoya L. AUSTIN, Appellant.,

v.

CAPITAL CITY BANK,

and

STATE OF KANSAS, Kansas Department of Health & Environment,
Division of Health Care **Finance**, Estate Recovery, Appellees.

No. 14-111,894-A.

October 2, 2014.

Appeal from the District Court of Johnson County, Kansas

Honorable Thomas M. Sutherland, Judge

District Court Case No. 2013-CV-5822

Brief of Appellee

Brian M. Vazquez #10328, Health Care **Finance** Legal Group, Kansas Department of Health & Environment, Ste. 560, Curtis State Office Bldg., 1000 SW Jackson Street, Topeka, Kansas 66612, Tel. No. (785) 296-0696, Fax. No. (785) 296-8825, E-mail:bvazquez@kdheks.gov, for appellee.

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***1 NATURE OF ACTION**

This matter involves the Kansas Medical Assistance program's recovery of the corpus left in a supplemental needs trust that conformed with [42 U.S.C. 1396p \(d\)\(4\)\(A\)](#) after the death of the beneficiary of the trust, a disabled child named Ceyonia Austin-Williams. The trust was created in 2003 and funded with the proceeds from a medical malpractice settlement. Ceyonia passed in 2011. The initial dispute pitted Ceyonia's *2 mother, Appellant LaToya L. Austin, against Appellee Capital City Bank, when the Bank, in 2013, refused to continue payments from the supplemental needs trust to the Appellant after Ceyonia's death. Appellant argued that Capital City breached contractual and fiduciary duties. In response to a motion to dismiss for failure to include a necessary party, Appellant was allowed to add the State of Kansas, the Kansas Department of Health and Environment (KDHE), the division within KDHE responsible for administering the Kansas Medicaid program, and the Estate Recovery program (collectively, KDHE hereafter). KDHE sought the corpus of the trust due to the inclusion of a Medicaid post-death recovery provision in Ceyonia's supplemental needs trust. The post-death recovery provision is a requirement for a resource-exempting Medicaid trusts created under [42 U.S.C. 1396p \(d\)\(4\)\(A\)](#). At trial, Appellant argued that the anti-lien provisions of [42 U.S.C. 1396p \(a\)\(1\)](#), as interpreted by *Arkansas Department of Health and Human Services v. Ahlborn*, 547 U.S. 268, 126 S.Ct. 1752, 164 L.Ed.2d 459 (2006) and *Wosv. E.M.A. ex rel. Johnson, U.S.*, 133 S.Ct. 1391, 185 L.Ed.2d 471 (2013), prevented or minimized the recovery by Kansas Medicaid from Ceyonia's supplemental needs trust. Appellant, also, argued that federal and state estate recovery provisions dealing with waiver of claim applied. After extensive briefing and argument, Honorable Thomas M. Sutherland, Johnson County District Judge, determined that there had been no breach of contractual or fiduciary duties by Capital City and that there was no legal basis to bar, limit, or waive the claims of Kansas Medicaid against the Ceyonia T. Austin-Williams Irrevocable Special Needs Trust. On appeal, Appellant only contests the portion of Judge Sutherland's decision concerning Kansas Medicaid's recovery from the supplemental needs trust.

***3 STATEMENT OF ISSUES**

I. Does the "anti-lien" provisions of [42 U.S.C. 1396p \(a\)\(1\)](#) apply as a bar or limit on a post-death recovery by a state Medicaid agency from a trust compliant with [42 U.S.C. 1396p \(d\)\(4\)\(A\)](#) ?

II. Does the Appellant state any meritorious issues?

STATEMENT OF FACTS

LaToya L. Austin (LaToya hereafter) was the mother of Ceyonia T. Austin-Williams (Ceyonia hereafter). During her birth on XX/XX/2000, Ceyonia suffered birth trauma resulting in multiple, permanent disabilities, including [epilepsy](#), [cerebral palsy](#), [microencephaly](#), and [scoliosis](#). R: v. 1, p. 221. Ceyonia would need lifetime care. R: v. 2, p. 10.

On December 14, 2001, Ceyonia, through her mother and next friend, LaToya L. Austin, filed a medical malpractice suit in Shawnee County District Court against various health care providers involved with the birth. The Shawnee County case was confidentially settled as to the various defendants in 2002 and 2003. R: v. 1, p. 80.

On February 14, 2003, the Ceyonia T. Austin Williams Irrevocable Special Needs Trust (Trust hereafter) was created and approved by the Shawnee County District Court. R: v. 1, p. 79. Thomas R. Hill, Appellant's current counsel, drafted the Trust. R: v. 1, pp. 35, 221; v. 2, p. 20. The Trust was designed to comply with [42 U.S.C. 1396p \(d\)\(4\)\(A\)](#) as a self-settled supplemental needs trust for the sole benefit of Ceyonia so that any proceeds paid to the trust would not disqualify Ceyonia from the Kansas medical assistance program (Medicaid hereafter). R: v. 1, pp. 14, 34, 221; v. 2, p. 20. The parties *4 have stipulated that the Trust was in conformance with [42 U.S.C. 1396p \(d\)\(4\)\(A\)](#). R: v. 1, p. 151. LaToya was named as a contingent beneficiary in Schedule B of the Trust. R: v. 1, p. 32. Capital City Bank was named trustee. R: v. 1, p. 221; v. 2, p. 22. The Trust contained the federal Medicaid statutory requirement that the corpus of the trust be paid to the state Medicaid program upon the death of

Ceyonia upto the extent of the state Medicaid claim. Any amounts left after payment to the Kansas Medicaid program would be paid to the beneficiary identified in Schedule B. *R: v. 1, p. 19*, 225.

The Trust received total payments of \$805,830 from the settlement of the Shawnee County lawsuit. They were paid in 4 installments: \$100,000 on March 4, 2003; \$205,830 on April 3, 2003; \$300,000 on March 5, 2004; and, \$200,000 on February 25, 2005. *R: v. 2, pp. 8-9*. There is no record that the amounts paid into the Trust were allocated or divided between various categories of damages or between Ceyonia and LaToya. *R: v. 1, pp. 224*; *v. 2, 22-24*.

Ceyonia passed away on January 3, 2011. *R: v. 2, p. 45*. The Kansas Medicaid program had paid \$541,754.25 for medical care Ceyonia received. At her death, the Trust corpus was \$355, 627.17. The amount of the claim of the Kansas Medicaid program and trust corpus upon Ceyonia's death were memorialized as stipulations between the parties. *R: v. 1, pp. 151*, 221.

In September 2010, Mr. John D. Tongier, one of the attorneys who represented Ceyonia and LaToya in the Shawnee County lawsuit, mediated a payment dispute between Capital City Bank and LaToya. LaToya sought additional payments. Capital City sought more substantiation. *R: v. 1, p. 222*. Mr. Tongier drafted and sent a *5 settlement letter. The letter did not modify the Trust as to post-death rights or expenses. *R: v. 1, p. 223*; *v. 2, p. 29*.

After Ceyonia's death, Capital City initially thought that Trust payments to LaToya should end. However, their decision to continue payments was swayed by Mr. Thomas R. Hill who asserted that a court would view LaToya sympathetically. Mark Burenheide, Trust Officer for Capital City, thought that Mr. Hill was acting as counsel for the Bank. Capital City continued to make payments to LaToya after Ceyonia's death until July 16, 2013. *R: v. 2, p. 39-42*. On July 16, 2013, Mr. Burenheide, on behalf of the Bank, refused to make payments to LaToya despite her demands and directed her to contact Mr. Hill. *R: v. 1, p. 223*; *v. 2, p. 42-43*.

On August 9, 2013 LaToya filed a Petition for Injunctive Relief and Declaratory Judgment in Johnson County District Court naming Capital City as single defendant and containing Counts for injunctive relief, breach of contract, and breach of fiduciary duty. *R: v. 1, pp. 5-10*, 224. On September 3, 2013, Capital City filed motions to dismiss the Petition for failure to join a necessary party and disqualify Thomas R. Hill as counsel. *R: v. 1, pp. 11-33*, 34-61. On October 1, 2013, the Honorable Thomas M. Sutherland, Johnson County District Court Judge, denied LaToya's request for injunctive relief and set a further hearing on the motions. *R: v. 1, pp. 62-63*. On October 4, 2013, LaToya filed an Amended Petition adding "State of Kansas; Kansas Department of Health and Environment, Division of Health Care **Finance**; and Estate Recovery" (collectively, KDHE hereafter) as defendants. *R: v. 1, pp. 76-82*. On October 29, 2013, Judge Sutherland granted LaToya leave to amend her Petition, allowed the addition of KDHE as a party defendant, and dismissed Capital City's motion to dismiss for failure to join a *6 necessary party and motion to disqualify LaToya's counsel. *R: v. 1, pp. 83-84*.

On November 15, 2013, Judge Sutherland conducted a hearing and took additional testimony and evidence, including stipulations between the parties as to the amount of the payments made by Kansas Medicaid program for Ceyonia and the corpus left in the Trust at the time of Ceyonia's death. (*R: v. 2, pp. 1 – 69*). During the hearing, Mr. John D. Tongier opined that Ceyonia's malpractice case was worth \$10 million, but was settled for approximately 15% of that value. *R: v. 2, p. 11*. Mr. Tongier, also, stated that the letter he wrote in September 2010 to mediate the dispute between LaToya and Capital City did not cover expenses after Ceyonia's death. *R: v. 2, p. 29*. Mr. Mark Burenheide testified as to circumstances leading to ending payments to LaToya. *R: v. 2, p. 39-43*.

After submission of proposed findings of fact and conclusions of law by the parties and oral argument on February 10, 2014, Judge Sutherland issued his "Memorandum Decision and Journal Entry of Judgment" on March 13, 2014. Judge Sutherland determined that there was no breach of contractual or fiduciary duties by Capital City and no legal basis to bar, limit or waive the Kansas Medicaid claim against the Trust. *R: v. 1, p. 229*.

On April 8, 2014, LaToya filed her Notice of Appeal with the Johnson County District Court. *R: v. 1, p. 230 – 231*.

ARGUMENT AND AUTHORITIES

I. The District Court correctly determined that the “anti-lien” provisions of 42 U.S.C. 1396p (a)(1) did not apply to a recovery by the Kansas Medicaid *7 program from a trust compliant with 42 U.S.C. 1396p (d)(4)(A).

a. Standard Of Appellate Review

This case involves issues of statutory interpretation and conclusions of law made by a district court. Such issues allow an appellate court to have unlimited review. *Frick v. City of Salina*, 289 Kan. 1, 7, 208 P.3d 739 (2009) (“Interpretation of statutes presents a question of law over which appellate courts exercise unlimited review.”); *American Special Risk Management Corp. v. Cahow*, 286 Kan. 1134, 1141, 192 P.3d 614 (2008) (“An appellate court has unlimited review of conclusions of law.”).

b. Medical Assistance Background

i. Medical Assistance – In 1965, Congress enacted the medical assistance program as Title XIX of the Social Security Act, “...for the purpose of providing federal financial assistance to States that choose to reimburse certain costs of medical treatment for needy persons.” *Harris v. McRae*, 448 U.S. 297, 301 (1980). Medicaid, as it is commonly known, is structured as a federal-state cooperative agreement. *Williams v. Kansas Dept. of SRS*, 258 Kan. 161, 899 P.2d 452 (1995). While a state is not required to participate in Medicaid, once it elects to do so, it must comply with the Medicaid statutes and the regulations promulgated by the Secretary of the United States Department of Health and Human Services (HHS). *Himes v. Shalala*, 999 F.2d 684, 686 (2d Cir. 1993); *Village Villa v. Kansas Health Policy Authority*, 296 Kan. 315, Syl. ¶ 1, 291 P.3d 1056 (2013); *Williams*, 258 Kan. at 164-65 (quoting *Himes*, 999 F.2d at 686). To implement the program, “[e]ach participating State develops a plan containing reasonable standards... for determining eligibility for and the extent of medical *8 assistance within boundaries set by the Medicaid statute[s] and the Secretary of [HHS].” *Wis. Dep’t of Health & Family Servs. v. Blumer*, 534 U.S. 473, 479, 122 S.Ct. 962, 151 L.Ed.2d 935 (2002) (internal quotation marks omitted); see also 42 U.S.C. § 1396a (a)(17).

ii. Single state Medicaid agency – 42 U.S.C. 1396a (a) (5) and 42 C.F.R. 431.10 require that a participating state designate a single state agency to be ultimately responsible for that state's Medicaid program. Per Executive Reorganization Order 38 (Chap. 134, 2011 Session Laws of Kansas), on July 1, 2011, the Kansas Department of Health and Environment (KDHE) became the single state Medicaid agency for Kansas and received all of the authority and responsibility previously vested with the Kansas Health Policy Authority (KHPA) for the Kansas Medicaid program. See, also, K.S.A. 75-7409. The programmatic responsibilities for Kansas Medicaid are exercised through the Division of Health Care Finance, KDHE.

iii. 42 U.S.C. 1396p - Under 42 U.S.C. 1396a (a) (18), a participating state (in Medicaid) must comply with the requirements of 42 U.S.C. 1396p dealing with liens, recoveries from estates, transfers of property requirements, and trusts provisions. *Hughes v. McCarthy*, 734 F.3d 473, 476 (C.A.6, 2013). Three different methods of recovery are noted in this federal statute.

A. 42 U.S.C. 1396p (a) - Subsection (a) of 42 U.S.C. 1396p states the basis and limitations for the use of pre-death liens against the property of a living Medicaid recipient. This subsection was originally added by the Tax Equity and Fiscal Responsibility Act of 1982 (TEFRA), P.L. 97-248, 96 Stat. 324 (1982). While TEFRA liens were intended to assist states in their Medicaid recoveries from property owned by *9 recipient who a court determined incorrectly received Medicaid benefits or from real estate owned by a living Medicaid recipient who was admitted to a long-term care facility paid in part or in whole by a state Medicaid program (see 42 U.S.C. 1396p (a)(1)(A) & (B)), the subsection includes language that the United States Supreme Court referred to as “anti-lien”. *Wos v. E.M.A. ex rel. Johnson*, ____ U.S. ___, 133 S.Ct. 1391, 1392-1393, 185 L.Ed.2d 471 (2013). (“The federal Medicaid statute's anti-lien provision, 42 U.S.C. § 1396p(a)(1), pre-empts a State's effort to take any portion of a Medicaid beneficiary's tort judgment or settlement not “designated as payments for medical care,” *1393 *Arkansas Dept. of Health and Human Servs. v. Ahlborn*, 547 U.S. 268, 284, 126 S.Ct. 1752, 164 L.Ed.2d 459.”) Since *Wos*, the “anti-lien” provision has been modified to apply a state Medicaid's lien against a living recipient's entire award from a recovery from

a third-party tortfeasor. See §202, *Bipartisan Budget Act of 2013* (H.J. Res 59), [P.L. 113-67](#) (Dec. 26, 2013). The effective date of §202 noted above has been delayed from October 1, 2014 to October 1, 2016. See §211, *Protecting Access to Medicare Act of 2014*, [P.L. 113-93](#) (April 1, 2014).

B. 42 U.S.C. 1396 (b) – [42 U.S.C. 1396p \(b\)](#) mandated “estate recovery” for participating Medicaid states. The estate recovery requirements have been explained in the following manner:

“The Medicaid Act provides that applicants may qualify for Medicaid benefits if they are aged, blind, or disabled and their income and resources are insufficient to meet the costs of health care. ([42 U.S.C. § 1396-1](#).) If the applicant is over the age of 55, his or her principal residence is excluded when determining eligibility. *10 This allows **elderly** applicants, despite having a valuable asset, to qualify for Medicaid covered services. ([42 U.S.C. § 1382b\(a\)\(1\)](#).) In exchange, federal law requires that the state recover all or a portion of the Medicaid benefits paid during the recipient's lifetime from his or her estate at death. ([42 U.S.C. § 1396p\(b\)\(1\)](#); see generally, *California Advocates for Nursing Home Reform v. Bonta* (2003) 106 Cal.App.4th 498, 508-509, 130 Cal.Rptr.2d 823.)”

Maxwell-Jolly v. Martin, 198 Cal.App.4th 347, 353, 129 Cal.Rptr.3d 278, 282 (2011).

C. 42 U.S.C. 1396p (d) – Per §13611 of the Omnibus Budget Reconciliation Act of 1993 (“OBRA ‘93”), [P.L. 103-66](#) (August 10, 1993), Congress identified Medicaid trust rules to be used by state Medicaid agencies in evaluating self-settled trusts and specified 3 specific types of trusts that could be used to sequester the assets of a Medicaid applicant or recipient and cause those sequestered assets to not be treated as available to Medicaid applicant or recipient. When codified, §13611 amended [42 U.S.C. 1396p](#) by adding subsection (d). Of relevance to this case, [42 U.S.C. 1396p \(d\)\(4\)\(A\)](#) specified the following type of trust as one that could sequester assets and allow a beneficiary to receive Medicaid if the trust complied with the federal requirements on age, disability, settlor, and post-death (of the Medicaid beneficiary) recovery of the corpus of the qualifying trust:

“(A) A trust containing the assets of an individual under age 65 who is disabled (as defined in section 1614(a)(3)) and which is established for the benefit of such individual by a parent, grandparent, legal guardian of the individual, or a court if the State will receive all amounts remaining in the trust upon the death of such *11 individual up to an amount equal to the total medical assistance paid on behalf of the individual under a State plan under this title.”

c. Judge Sutherland correctly determined that the “Anti-Lien” provisions of 42 U.S.C. 1396p (a)(1) do not apply to Kansas Medicaid's recovery from a supplemental needs trust compliant with 42 U.S.C. 1396p (d)(4)(A).

Appellee KDHE has contended throughout this case that *Ahlborn* and *Wos* and the “anti-lien” provisions of [42 U.S.C. 1396p \(a\)\(1\)](#) do not apply to this matter. KDHE suggested to Judge Sutherland two reasons for this contention. First, the statutory language of [42 U.S.C. 1396p \(a\)\(1\)](#) cited by *Ahlborn* and *Wos* limits itself to living recipients. Second, when a Medicaid recipient uses a supplemental needs trust compliant with [42 U.S.C. 1396p \(d\)\(4\)\(A\)](#) to shield disqualifying assets, the recipient, in essence, trades current Medicaid eligibility for deferred recovery by a state Medicaid program.

KDHE's first contention is based on statutory construction of [42 U.S.C. 1396p \(a\)\(1\)](#). KDHE suggested that the principal canon of construction instructs attorneys and courts to start with statutory language to determine legislative intent. If the statutory language is clear and unambiguous, no further review or analysis is required. *Kansas Judicial Review v. Stout*, 287 Kan. 450, 460 (2008) (“The most fundamental rule governing statutory interpretation is that “the intent of the legislature governs if that intent can be ascertained. The legislature is presumed to have expressed its intent through the language of the statutory scheme it enacted.” *State ex rel. Stovall v. Meneley*, 271 Kan. 355, 378, 22 P.3d 124 (2001). Thus, when the language of a statute is plain and unambiguous, courts “need not resort to statutory construction.” *12 *In re K.M.H.*, 285 Kan. 53, 79-80, 169 P.3d 1025

(2007). Instead, “[w]hen the language is plain and unambiguous, an appellate court is bound to implement the expressed intent.” *State v. Manbeck*, 277 Kan. 224, Syl. ¶ 3, 83 P.3d 190 (2004). plain meaning of the statutory language.”)

As noted earlier, Justice Kennedy in the *Wos* opinion identified 42 U.S.C. 1396p (a)(1) as containing the “anti-lien” restrictions cited in *Ahlborn* and *Wos* that are championed by the Appellant *Wos* at 133 S.Ct. 1391, 1392-1393. 42 U.S.C. 1396p (a)(1) provides:

“(a) Imposition of lien against property of an individual on account of medical assistance rendered to him under a State plan

(1) No lien may be imposed against the property of any individual **prior to his death** on account of medical assistance paid or to be paid on his behalf under the State plan, except - ...” Emphasis added.

In this case, KDHE submitted that the plain language of 42 U.S.C. 1396p (a)(1) shows Congress' intent that the “anti-lien” provisions only apply to living Medicaid recipients. As a result, any post-death recoveries through “estate recovery” under 42 U.S.C. 1396p (b) or the mandatory post-death trust recovery provisions under 42 U.S.C. 1396p (d)(4)(A) are unaffected by the “anti-lien” provisions or the *Ahlborn* and *Wos* decisions.

Judge Sutherland reached this same conclusion in his Memorandum Opinion when he stated:

“This Court is persuaded that the *Ahlborn* and *WOS* decisions are not determinative of the issues presented in this case. In both cases, the ruling was *13 essentially that a state cannot recover any portion of a Medicaid beneficiary's tort judgment or settlement not designated as payments for medical care. However, these cases involved analysis of 42 U.S.C. 1396p(a) (1), which states, “No lien may be imposed against the property of any individual **prior to his death** on account of medical assistance paid or to be paid on his behalf under the State plan, except,” (Emphasis added.) The present case does not involve a state's attempt to assert a lien on a settlement prior to the death of a Medicaid beneficiary. Instead, this case involves a trust specifically authorized and recognized by 42 U.S.C. 1396p(d)(4)(A) which, as a condition precedent to qualifying as such a trust, specifically provides for recovery by the state “upon the death of such individual”. Because the present case involves a (d)(4)(A) trust, and the State's attempt to recover remaining corpus of the trust following the death of the Medicaid beneficiary, this Court finds that *Ahlborn* and *WOS* are simply not applicable.”

R: v. I, 227. KDHE submits that Judge Sutherland correctly determined this matter. KDHE further submits that this statutory construction, alone, is determinative and dispositional of all of Appellant's arguments.

KDHE, also, contended to Judge Sutherland that when a Medicaid recipient uses a trust compliant with 42 U.S.C. 1396p (d) (4)(A) and designates themselves as the beneficiary of such trust, the recipient beneficiary has entered into a bargain where they traded immediate eligibility for Medicaid assistance in return for the state's potential recovery against the trust upon the death of the beneficiary. While KDHE thought that *In re Watkins*, 24 Kan.App.2d 469, 947 P.2d 45 (1997), hinted at this conclusion, KDHE granted that Kansas did not have newer cases that discussed Medicaid compliant trusts and either the *Ahlborn*, *Wos*, or the “anti-lien” provisions. KDHE, as a result, suggested to Judge Sutherland that *In the Matter of the Estate of Abraham XX, Deceased*, 11 N.Y. 3d 429; 900 N.E. 2d 136 (2008) provided some guidance.

Abraham XX involved the question of whether a post-death recovery by the New York Medicaid program from a trust compliant with 42 U.S.C. 1396p (d)(4)(A) covered all Medicaid payments by the state or only those Medicaid payments made after the creation of the trust. *Abraham XX* suffered birth trauma in 1992 which resulted in **spastic quadriplegic cerebral palsy**. *Abraham XX* went immediately into care paid by the New York Medicaid program. His mother successfully prosecuted a medical malpractice suit. In March 1998, a verdict and settlement was reached. New York Medicaid received payment of their pre-death Medicaid lien to-date. While ineligible due to the size of the settlement, *Abraham XX* was continued in the New York Medicaid system since the family's intent was to place the remaining settlement proceeds into a supplemental needs trust (SNT) compliant with New York and federal law concerning qualifying trusts under Medicaid. However, due to negotiation

and litigation, there was a delay between the payment of the settlement amounts and the creation and funding of the trust. Once the trust was funded, it was made retro-active to the date that eligibility would have been lost. When Abraham XX died in 2003 and New York Medicaid sought its post-death recovery from the SNT, a dispute arose as to the period of time for which the New York Medicaid program could recover, or as the *Abraham XX* opinion noted the issue:

*15 “Payment of the settlement was delayed due to the parties' dispute regarding allocation of the proceeds. Abraham remained *433 in care during this time, and the State continued to pay his Medicaid costs until a \$2.17 million lump-sum settlement payment made him Medicaid-ineligible. After years of litigation and an appeal to this Court (*see Gold v. United Health Services Hosps.*, 95 N.Y.2d 683, 723 N.Y.S.2d 117, 746 N.E.2d 172 [2001]) the \$2.17 million was retroactively placed in a supplemental needs trust (SNT) created on Abraham's behalf, thereby reviving his Medicaid eligibility. As a result, there exists a gap between the date of the jury's verdict (also the expiration date of the State's Medicaid lien) - March 23, 1998 - and the date the SNT was funded - September**138 ***601 12, 1999.FN2 Reimbursement for Medicaid payments made during this gap is the issue before us.”

Note: Text of footnote 2 missing in original document

Abraham XX at 432-433. The family argued that the restrictions under “estate recovery” at 42 U.S.C. 1396p (b)(1) applied to post-death recoveries from trusts compliant with 42 U.S.C. 1396p (d)(4)(A). (Estate recovery under 42 U.S.C. 1396p (b)(1) is limited to properly paid benefits. Monies paid by New York Medicaid during a period on ineligibility would be improperly paid benefits.)

While *Abraham XX* dealt with issues not argued in our Kansas case, KDHE suggested to Judge Sutherland that the New York appellate court noted several relevant conclusions. On the purpose for a supplemental needs trust, the New York court noted:

“A supplemental needs trust is a planning tool used to shelter a severely disabled person's assets for the dual purpose of securing or maintaining eligibility for state- *16 funded services, and enhancing the disabled person's quality of life with supplemental care paid by his or her trust assets.”

Abraham XX at 434. On the history and basis for a Medicaid-compliant supplemental needs trust, the New York court noted: “In the same year that New York State codified the SNT, the United States Congress enacted the Omnibus Budget Reconciliation *435 Act of 1993 (OBRA) to “tighten the eligibility requirements for Medicaid” and to curb **abusive** asset transfers, especially by the **elderly** (Rosenberg, *Supplemental Needs Trusts for People with Disabilities: The Development of a Private Trust in the Public Interest*, 10 BU Pub Int. LJ 91, 127 [2000]). The general rule is that a Medicaid candidate's trust assets are considered “available resources” and count toward determining that candidate's eligibility for state services.

Disability advocates - concerned about the viability of trusts created by parents to provide for their disabled children's futures - lobbied the federal government for protection. One such protection materialized in 42 U.S.C. § 1396p (d)(4)(A) - the federal provision at issue here - by striking a balance between the tightened eligibility requirements and the heightened needs of severely disabled individuals who receive a lump sum of money sizeable enough to end their Medicaid eligibility.”

Abraham XX at 434 - 435. On the “bargain” created when one uses a trust compliant with 42 U.S.C. 1396p (d)(4)(A), the New York court stated:

“This construction advances the underlying purpose of the bargain struck between *17 the SNT beneficiary and the State. The SNT is available only to applicants under the age of 65 with severe disabilities as defined by statute. Unless the applicant placed excess assets in the Medicaid SNT for supplemental care, he or she would no longer be eligible for Medicaid, thus relieving the State of a substantial **financial** burden.

In order to further Medicaid's purpose of providing medical assistance to needy persons, the State agrees to continue paying Medicaid costs - in instances where it would otherwise be relieved of this obligation - in exchange for the *possibility* of reimbursement upon the recipient's death. The State in a sense is like an insurer calculating risk. For every recipient who depletes the trust before death, the State can expect some trusts to have sufficient assets upon a recipient's death to offset the additional cost of continuing Medicaid payments for these severely disabled individuals who *437 otherwise would be ineligible. Moreover, the State's right to reimbursement occurs only upon the death of the beneficiary - at a time when the life-enhancing purpose of the trust can no longer be effectuated. The Medicaid SNT reflects a policy decision to balance the needs of the severely disabled and the State's need for funds to sustain the system.

Abraham XX at 436 - 437. And, finally, in response to whether the Ahlborn decision and the "anti-lien" provisions were a limitation on a state Medicaid program's post-death recoveries from a trust compliant with 42 U.S.C. 1396p (d)(4)(A), the New York Court stated:

"Finally, appellant argues that the United States Supreme Court's decision in *18 *Arkansas Dept. of Health & Human Servs. v. Ahlborn*, 547 U.S. 268, 126 S.Ct. 1752, 164 L.Ed.2d 459 [2006] mandates that the anti-recovery provisions apply in this context. We disagree. In *Ahlborn*, the Supreme Court held that a state's assignment right to "payment for medical care from any third party" (42 U.S.C. § 1396k [a][1][A]) grants the state a right only to the portion of a judgment or settlement allocated to medical care and not to portions allocated toward lost wages or pain and suffering. In so holding, the Supreme Court added that Arkansas' statute - which permitted the state to recover from the entirety of the settlement - conflicted with the anti-lien provision found in 42 U.S.C. § 1396p(a). The anti-lien provision is not at issue in this case and the U.S. Supreme Court expressly declined to address the impact, if any, of the anti-recovery provision in 42 U.S.C. § 1396p(b) (see *Ahlborn*, 547 U.S. at 284 n. 13, 126 S.Ct. 1752). *Ahlborn* did not involve the interpretation of an SNT, or the interpretation of the Medicaid SNT statute, and it is therefore inapplicable to the matter before us."

Abraham XX at 438.

Judge Sutherland, in his Memorandum Decision, stated:

"Unfortunately, there is no Kansas case directly on point. However, the defendants have cited *In the Matter of the Estate of Abraham XX, Deceased*, 11 N.Y. 3d 429; 900 N.E. 2d 136 (2008). In *Abraham*, the Court of Appeals of New York gives a compelling analysis of the *quid pro quo* that exists when a 1396p(d)(4)(A) trust is established. In *Abraham*, a case that involved a 1396(d)(4)(A) trust, the Plaintiff argued the Ahlborn decision applied and prevented recovery by the state. The Court of Appeals rejected this *19 argument, stating:

In *Ahlborn*, the Supreme Court held that a state's assignment right to "payment for medical care from any third party" (42 U.S.C. 1396 [a][1][A]) grants the state a right only to the portion of a judgment or settlement allocated to medical care and not to portions allocated toward lost wages or pain and suffering. In so holding, the Supreme Court added that Arkansas's statute - which permitted the state to recover from the entirety of the settlement - conflicted with the anti-lien provision found in 42 U.S.C. §1396p (a). The anti-lien provision is not at issue in this case and the U.S. Supreme Court expressly declined to address the impact, if any, of the anti-recovery provision in 42 U.S.C. § 1396p (b) (see *Ahlborn*, 547 U.S. at 284 n. 13, 126 S.Ct. 1752). *Ahlborn* did not involve the interpretation of an SNT, or the interpretation of the Medicaid SNT statute, and it is therefore inapplicable to the matter before us."

R: v. I, p. 228. Judge Sutherland concluded:

"3. Plaintiff has failed to present a legal basis to bar, limit or waive the claims of Kansas Medicaid against the Ceyonia T. Austin-Williams Irrevocable Special Needs Trust."

R: v. 1, p. 229. KDHE submits that Judge Sutherland correctly determined that *Ahlborn*, *Wos*, and the “anti-lien” provisions of [42 U.S.C. 1396p \(a\)\(1\)](#) do not apply to this case. As a result, KDHE urges the conclusion that it can recover the amounts left in the Ceyonia T. Austin Williams Irrevocable Special Needs Trust.

*20 II. APPELLANT'S BRIEF STATES NO MERITORIOUS ISSUES.

a. Standard Of Appellate Review

This case involves issues of statutory interpretation and conclusions of law made by a district court. All such issues allow an appellate court to have unlimited review. *Frick v. City of Salina*, 289 Kan. 1, 7, 208 P.3d 739 (2009) (“Interpretation of statutes presents a question of law over which appellate courts exercise unlimited review.”); *American Special Risk Management Corp. v. Cahow*, 286 Kan. 1134, 1141, 192 P.3d 614 (2008) (“An appellate court has unlimited review of conclusions of law.”).

b. Appellant's Issues I, II and IV that are based on *Ahlborn* or *Wos* do not apply.

Appellant states 5 “Issues” in her brief. Issues I, II and IV are permutations of her central theme that the *Ahlborn* and/or *Wos* cases control. None of her arguments deal with a post-death recovery from a trust compliant with [42 U.S.C. 1396p \(d\)\(4\)\(A\)](#). As a result, they do not apply.

Appellant's Issue I, while somewhat convoluted, seems to argue for allocation of the corpus left in the Ceyonia T. Austin Williams Irrevocable Special Needs Trust trust due to John Tongier's opinion that he allowed the case to settle for 15% of what the case was worth. R: v. 1, p. 227. From there, Appellant argues that the state's claim should be barred or reduced and posits two different reimbursement scenarios. However, her ostensible legal basis is *Ahlborn*. *Brief of Appellant*, p. 5.

Appellant's Issue II, in essence, argues that all Medicaid recoveries should follow *Ahlborn* and *Wos*. *Brief of the Appellant*, p. 9. (“Whether the state agency is attempting *21 to enforce a lien or pursue estate recovery, the result is the same. The State's efforts are to secure money from Plaintiffs full tort recovery. The United States Supreme Court has ruled (twice) that only the portion of a tort recovery that is dedicated to medical expenses is recoverable. (Ahlbo's and Wos)” Emphasis in the original.) Appellant does refer to *Tristani v. Richman*, 652 F.3d 360, 375 (3rd Cir.2011), an unpublished opinion captioned as *Special Needs Trust for K.C.S. v. Folkemer*, (Not Reported in F.Supp.2d, 2011 WL 1231319 (D.Md.,2011), and *In re E.B.*, 229 W.Va. 435, 729, S.E.2d 270 (W.Va.,2012) to show various methods used by state Medicaid programs for referring to recoveries using subrogation liens, but none of the cited cases deal with a post-death recovery from a trust compliant with [42 U.S.C. 1396p \(d\)\(4\)\(A\)](#).

Appellant's Issue IV cites a West Virginia Supreme Court case that determined *Ahlborn* required preemptive modification of West Virginia's statute for Medicaid subrogation liens. The West Virginia Supreme Court granted that federal Medicaid statutes required a state Medicaid program to seek recovery from liable third-parties who had injured state Medicaid recipients if the state Medicaid program had paid for medical care as a result of those tort-feasor caused injuries. See [42 U.S.C. 1396a\(a\)\(25\)](#) and [42 U.S.C. 1396k](#). However, the West Virginia Supreme Court concluded that *Ahlhorn* limited the West Virginia's assignment of rights from an injured Medicaid recipient and its corresponding Medicaid subrogation lien to, “...recipient's right to recover for medical expenses.” *In re E.B.* at 457. Since state Medicaid programs were also federally directed to recover their medical payments from liable third-parties, the West Virginia Supreme Court reviewed a memorandum from the Centers for Medicare and Medicaid Services *22 (CMS) advising the states on how to deal with *Ahlborn* and Medicaid subrogation liens. In re E.B. at 458. (“In a memorandum issued by the Centers for Medicaid and Medicare Services (“CMS”) to all Associate Regional Administrators for Medicaid and State Operations following the *Ahlborn* decision, the CMS concluded that statutory language such as that found in [W. Va.Code § 9-5-11](#) necessarily requires revision. The CMS memorandum was issued specifically to aid the states in understanding the effect which the *Ahlborn* decision would have on state third-party liability recovery.”) Despite its

length, the opinion did not discuss a post-death recovery from a trust compliant with [42 U.S.C. 1396p \(d\)\(4\)\(A\)](#). Nonetheless, Appellant urges this Court to follow West Virginia's lead.

Respectfully, Appellant's "Issues" and her cited cases do not deal with a post-death recovery from a supplemental needs trust compliant with [42 U.S.C. 1396p \(d\)\(4\)\(A\)](#). While her arguments might have been relevant to her daughter's medical malpractice suit if it had been prosecuted after *Ahlborn*, while her daughter was alive, and negotiations were ongoing with the Kansas Medicaid program concerning the state's Medicaid subrogation lien, her arguments are without relevance or merit for the current case.

Yet, Appellant continues to insist without any basis or analysis that United States Supreme Court cases from 2006 and 2013 involving a state's Medicaid subrogation lien should now apply to a 2003 special needs trust in a manner where she can recover all or a portion of the remaining corpus of her daughter's supplemental needs trust. Appellant makes this argument despite her counsel from the medical malpractice suit admitting that *23 the Appellant neither prosecuted nor received any damages from her daughter's Shawnee county medical malpractice suit justifying any discussion of allocation. *R: v. 2, pp. 23-24*. Appellant further makes this argument more than 5 years after the execution of the trust and despite the clear language of her daughter's supplemental needs trust that upon her daughter's death, the trust, "...shall distribute any remaining principal and income, up to an amount equal to the total medical assistance paid on behalf of a state plan, to said paying state to reimburse Medicaid costs." *R: v. 1, p. 19*, 223. Appellant further makes this argument despite having convinced a Shawnee county court to approve the creation and funding of a trust for the sole purpose of gaining the benefit of continual Medicaid coverage for her daughter and inducing the state Medicaid program to have provided same. (While Appellant may not have intended her arguments to be viewed in this manner, KDHE contends that her arguments, if accepted, would constitute the death knell for the use of supplemental needs trusts for Medicaid planning if the state Medicaid program can not rely on the promises made in such documents.)

KDHE submits that Appellant's Issues based on *Ahlborn* and *Wos* are without merit. KDHE submits that Judge Sutherland correctly concluded that *Ahlborn* and *Wos* do not apply.

c. Appellant's Issue III and V improperly raise new arguments.

Appellant argues in Issue III in her Brief that [K.S.A. 39-719a](#) covering Kansas Medicaid's subrogation lien is defective because it contains no allocation process. Appellant argues in Issue V that the Kansas Court of Appeals should remand this case back to Judge Sutherland due to an unpublished Maryland Chancery Court decision *24 concerning the period of time to be covered by the repayment provision of a trust compliant with [42 U.S.C. 1396p \(d\)\(4\)\(A\)](#). Both Issues are newly presented on appeal.

Generally, issues not raised before the trial court cannot be raised on appeal. *Wolfe Electric, Inc. v. Duckworth*, 293 Kan. 375, 403, 266 P.3d 516 (2011); *Johnson v. Westhoff Sand Co.*, 281 Kan. 930, Syl. ¶ 12, 135 P.3d 1127 (2006). Appellant offers no reason for the consideration of these issues on appeal. *Supreme Court Rule 6.02(a)(5)*.

In fairness, while KDHE believes these are new issues on appeal, KDHE still examined the issues. Candidly, KDHE ended up being perplexed by Appellant's Issues.

On Issue III, given the nature of the case before Judge Sutherland, KDHE does not see any reason for a discussion concerning [K.S.A. 39-719a](#) to determine compliance with *Ahlborn* or *Wos*. No evidence was offered or argument made concerning the propriety of Ceyonia's Shawnee County case. Further, there was no evidence presented that Kansas Medicaid in 2002 or 2003 approached the plaintiffs concerning a Medicaid subrogation lien. The sole evidence was that all proceeds, after payment of fees and expenses, from the settlement were placed into Ceyonia's trust. *R: v. 2, pp. 23-24*. This pushed the focus before Judge Sutherland to the interpretation of Ceyonia's trust. As a result, any discussion of Kansas Medicaid's potential subrogation lien on [K.S.A. 39-719a](#) would have been irrelevant to the interpretation of trust language and compliance with the statutory provisions of [42 U.S.C. 1396p \(d\)\(4\)\(A\)](#).

Similarly, Appellant's Issue V is perplexing. Appellant urges this Court to follow the unreported *First Capital Surety & Trust Co. v. Elliott*, Not Reported in A.3d, [2012 WL 4471244 \(Del.Ch.,2012.\)](#) instead of *Abraham XX* on the issue of the valuation of the *25 state's Medicaid claim and remand the matter back to Judge Sutherland for further evidentiary hearing. (*Abraham XX* determined that all Medicaid payments were included due to statutory and trust language; *First Capital* starts the Medicaid claims accrual with the creation of the supplemental needs trust.) Appellant's purpose seems to be the determination of the amounts that Kansas Medicaid paid for Ceyonia's care before February 14, 2003, the creation date for her supplemental needs trust. R: v. 1, p. 79. At the hearing on November 15, 2013, KDHE offered to present a 54 page exhibit documenting Kansas Medicaid's payments and even engaged in jovial discussion with Judge Sutherland concerning the exciting nature of the exhibit. R: v. 2, p. 33. Instead, the parties stipulated that the Kansas Medicaid's claim for repayment from Ceyonia's trust was \$541,754.25. R: v. 1, pp. 151, 221. Now, Appellant appears to have reached a different conclusion and noted this new position on appeal despite her prior stipulation.

KDHE urges this Court to find that Issues III and V are new matters raised on appeal and without merit for consideration in this appeal.

CONCLUSION

Appellee KDHE urges the conclusion that Judge Sutherland correctly determined this matter. Judge Sutherland determined that the United States Supreme Court cases of *Ahlborn* and *Wos* were not applicable to this trust interpretation case. Judge Sutherland concluded that Appellant, (plaintiff below) had, "... failed to present a legal basis to bar, limit or waive the claims of Kansas Medicaid against the Ceyonia T. Austin-Williams Irrevocable Special Needs Trust." While Appellant raised 5 "Issues" that either re-stated her contention that *Ahlborn* and *Wos* applied or raised new issues on appeal, Appellant *26 did not rebut or counter KDHE's argument and Judge Sutherland's determination that the "anti-lien" provisions of [42 U.S.C. 1396p \(a\)\(1\)](#) championed in *Ahlborn* and *Wos* do not apply to a deceased Medicaid recipient who was the beneficiary of a supplemental needs trust compliant with [42 U.S.C. 1396p \(d\)\(4\)\(A\)](#). Appellant's appeal should be rebuffed.